purchase of heavy duty pallet racks, and then on August 29, 1984 Rekayasa (presumably on behalf of Pupuk) cancelled the order, on the ground that Rekayasa was "worried" that the defendants "would repeat the same error." In the circumstances, that letter of August 29, 1984 of Rekayasa was suspect, and hardly any weight could be given to it.

I now turn to the principle relied upon in support of the claim for such a loss. It was submitted on behalf of the defendants that the loss of this order by the defendants was one ordinarily and naturally within the contemplation of the parties as a consequence of the breach of the second contract by the plaintiffs: a loss falling within the first branch of the rule in *Hadley* v. *Baxendale.*[1] The short answer to this argument is that, on the facts, such a loss could not have been within the contemplation of the parties at the time of the contract. First, the contract in which the plaintiffs committed a breach was one for the sale of grout, and the order said to have been lost was for the purchase of heavy duty pallet racks – entirely different goods, unrelated to the grout contracted to be sold to the defendants. Secondly, the purchase order of Pupuk for the heavy duty pallet racks was placed with the defendants after the breach of the second contract by the plaintiffs and could not possibly had been contemplated by the parties at the time that contract was made.

The case of *GKN Centrax Gears Ltd.* v. *Matbro Ltd.*[2] was cited on behalf of the defendants in support. There, the plaintiffs manufactured drive axles and supplied them to the defendants who made fork lift trucks, and the axles were incorporated into the trucks. The trucks supplied by the defendants broke down and the defendants alleged that that was due to the defective axles supplied by the plaintiffs. The plaintiffs were owed a substantial sum for the supply of the axles and brought an action to recover the amount; the defendants counterclaimed for losses which they had suffered. The Court of Appeal in England held that the defendants were entitled to damages for loss of orders from their customers. Lord Denning M.R. said, at p. 574:

"That principle applies to loss of repeat orders as well as to other losses. Applying the principle here Centrax knew as well as anybody the purpose for which these axles were required. It must have been within the contemplation of the parties that if these axles failed, it would cause much damage to the goodwill of Malbro. Customers would be disappointed and would not order any more. It seems to me that the arbitrator was entirely correct. Loss of repeat orders from existing customers can be recovered where that is naturally within the contemplation of the parties as a consequence of the breach."

Stephenson L.J. said, at p. 577:

"... Such loss of custom from customers to whom resales are contemplated, is not, in my opinion, a special circumstance within the second rule in *Hadley* v. *Baxendale*, but a direct and likely result of the use to which Centrax knew their axles were to be put, and arises naturally according to the ordinary course of things within the first rule."

It seems to me clear that the basis for awarding the loss of repeat orders in that case was that the manufacturers knew that the axles supplied by them would be incorporated into the trucks built and sold by the defendants to the latter's customers and that it was within the contemplation of the parties that if the axles failed serious loss in sales would be occasioned to the defendants. Such was not the case here. As I have demonstrated above, the loss of the purchase order placed by Pupuk could not have been within the contemplation of the parties at the time of the second contract.

For all these reasons, the appeal must succeed.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Singa Retnam.*

HONG KONG TEAKWOOD LTD. v. HYUNDAI ENGINEERING & CONSTRUCTION CO. LTD.

[O.C.J. (Thean J.) June 27, 1987]

[Singapore – Originating Summons No. 540 of 1987]

Contract – Sub-contract – Performance bond – Letter of guarantee – Interim injunction to restrain defendants from enforcing guarantee against bank – Application to discharge injunction – Balance of convenience.

Practice and Procedure – Interim injunction taken out ex parte – Application to discharge injunction allowed – Balance of convenience.

The defendants were the main contractors in the building of a hotel, "The Oriental." The plaintiffs were a sub-contract of the defendants. By clause D of the sub-contract the plaintiffs contracted to provide a performance bond for the duration of the sub-contract and at their own expense. In pursuance of this clause a letter of guarantee from Bank of America N.T. and S.A. ("the Bank") dated January 9,

1984 was issued in favour of the defendants for the sum of $411,718.48.

That guarantee was subsequently renewed on several occasions the last being on April 6, 1987 when the plaintiffs caused the same to be renewed to expire on May 15, 1987.

By a telex dated April 21, 1987 the defendants informed the plaintiffs that the defendants would be prepared to accept a renewal of the guarantee up to August 31, 1987 on condition that the plaintiffs agree to a further extension after that date, if requested by the defendants and they required the plaintiffs' confirmation by April 24, 1987 that they would renew the guarantee.

The condition stipulated in the telex was not acceptable to the plaintiffs who maintained that "it would mean that the guarantee would be enforceable as long as the defendants required it." The plaintiffs claimed that the further renewal of the guarantee on the condition stipulated in the defendants' telex was not justified on several grounds.

On May 13, 1987 the plaintiffs initiated the present proceedings against the defendants claiming for a declaration that on a true construction of the sub-contract the defendants were not entitled to enforce the guarantee as extended to May 15, 1987, or to require a renewal of the same and for the necessary injunction. On the same day they took out an application *ex parte* for, and were granted an interim injunction restraining the defendants from enforcing the guarantee against the Bank. The defendants applied for the injunction to be discharged.

The following facts were, *inter alia*, brought to the attention of the present court: (i) Clause D of the sub-contract provided that a performance bond issued under that clause "shall be current for the duration of the sub-contract and shall be renewed if sub-contract completion is delayed"; (ii) the architect had not issued a certificate of practical completion for the whole of the works; (iii) under clause 9(a) of the conditions of the sub-contract, the plaintiffs were under an obligation to make good all defects in the sub-contract works which the defendants, as the main contractor, shall be liable to make good under the main contract.

Held: having considered all the said provisions the balance of convenience was clearly in favour of discharging the injunction. The injunction should be discharged.

ORIGINATING SUMMONS.

K.S. Chung (*Reny Margaret George* with him) for the plaintiffs.

Naresh M. Mahtani for the defendants.

Cur. Adv. Vult.

Thean J.: Hyundai Engineering & Construction Company Limited, the defendants, are the main contractors for the construction of the hotel known as "The Oriental" at Marina Square, Singapore, under a building contract dated September 15, 1982. Hong Kong Teakwood Works Limited, the plaintiffs, are a sub-contractor of the defendants under a sub-contract dated July 12, 1984 ("the Sub-Contract"). By Clause D on page P/11 of the Sub-contract, it is provided:

> "D The Sub-contractor shall at his own expense provide a performance bond, a specimen of which is attached in the Appendix. The bond shall be with a bank approved by the Contractor and shall be in an amount equal to 5% of the Sub-Contract Sum. The performance bond shall be current for the duration of the Sub-Contract and shall be renewed if Sub-Contract completion is delayed. If any delay is beyond the control of the Contractor, the Sub-Contractor shall bear the cost of any additional charges in respect of such renewal."

In pursuance of this clause, a letter of guarantee from Bank of America N.T. and S.A. ("the Bank") dated January 9, 1984 was issued in favour of the defendants for the sum of $411,718.48, being 5% of the sub-contract sum of $8,234,369.64. That guarantee was subsequently renewed on several occasions, the last being on April 6, 1987, when the plaintiffs caused the same to be renewed to expire on May 15, 1987. By a telex dated April 21, 1987, the defendants informed the plaintiffs that the defendants would be prepared to accept a renewal of the guarantee up to August 31, 1987 on condition that the plaintiffs agree to a further extension after that date, if requested by the defendants, and they required the plaintiffs' confirmation by April 24, 1987, that they would renew the guarantee. The condition stipulated in the telex was not acceptable to the plaintiffs, who maintained that "it would mean that the guarantee would be enforceable as long as the defendants required it." The plaintiffs claim that the entire work required to be done under the Sub-contract was completed and handed over on March 28, 1987, and further renewal to August 31, 1987 on the condition as given in the defendants' telex of April 21, 1987 was not justified, having regard to the following:

(a) The entire work under the sub-contract had been completed and handed over to the architect on March 28, 1987.

(b) There is due from the defendants a sum of $373,300, being the amount certified by the architect as due and payable, and a further sum of $467,518.36 which would be certified by the architect to be due and payable.

(c) The owners are claiming against the defendants $62,000,000 as liquidated damages for delay in

completion and are seeking to set off this sum against money due or to become due to the defendants, and in view of the huge amount claimed by the owners, the defendants may not be in a position to make payment of the amounts due to the plaintiffs.

(d) Further, there is a retention sum of $234,645 being withheld by the defendants as retention money under the Sub-contract.

On May 13, 1987, the plaintiffs initiated the present proceedings against the defendants claiming for a declaration that on a true construction of the Sub-contract, the defendants are not entitled to enforce the guarantee as extended to May 15, 1987, or to require a renewal of the same and for the necessary injunction. On the same day, they took out an application *ex parte* for an interim injunction restraining the defendants from enforcing the guarantee against the Bank, and I granted the injunction as applied. Immediately after the service of the injunction, the defendants applied to me on May 15, 1987 for the injunction to be discharged. Counsel for the plaintiffs and the defendants appeared before me on the hearing of this application on that day. At the conclusion of the hearing, I was of the opinion that the injunction which I granted could not stand and ought to be discharged. On the other hand, it was the eleventh hour and if the injunction was discharged, the defendants would enforce the guarantee against the Bank and a sum of $411,718.48 would forthwith become payable and be paid to the defendants. On the other hand, if a demand was not issued on that day to the Bank for payment under the guarantee, the right to enforce the guarantee would be lost after the lapse of that day. In the circumstances, I decided to impose a condition. Accordingly, I discharged the injunction on the condition that if the defendants were to call on the Bank for payment under the letter of guarantee dated April 6, 1987, the defendants should state in the demand that payment under the guarantee may be made by the Bank on the expiry of three business days (excluding Saturday and Sunday) after the date of demand, and if within the said three-day period, the letter of guarantee was renewed for further period expiring on August 31, 1987, the said demand is deemed to have been withdrawn. This would give the plaintiffs an opportunity to arrange for a renewal of the guarantee.

It was contended on behalf of the defendants that, firstly, on a balance of convenience, the injunction should not be continued and should be discharged, and secondly, under the provisions of the Sub-contract the plaintiffs were contractually obliged to extend the performance bond. It was brought to my attention that: (i) Clause D on page P/11 of the Sub-contract expressly provides that a performance bond issued under that clause "shall be current for the duration of the Sub-contract and shall be renewed if Sub-contract completion is delayed"; (ii) the architect has not issued a certificate of practical completion for the whole of the works; (iii) under Clause 9(a) of the Conditions of the Sub-Contract (at page 11), the plaintiffs are under an obligation to make good all defects, shrinkages and other faults in the Sub-Contract works which the defendants, as the main contractor, shall be liable to make good under the Main Contract; (iv) Clause B on page P/17 provides: "The Sub-Contractor shall make good any defects, shrinkages or other faults which shall appear within the defects liability period of 12 months"; (v) under Clause A on page P/26, "the Sub-Contract includes the making good of the Sub-Contract Works for the period of twelve months from the date of Practical Completion as certified by the Architect," and lastly, (vi) the defects liability period for the sub-contract works will not expire at least until twelve months after the handing over of the plaintiffs' work which took place on March 28, 1987. Having considered all these provisions, I was left in no doubt that the injunction could not be continued. I also accept the argument advanced on behalf of the defendants that the balance of convenience is clearly in favour of discharging the injunction. If the injunction is continued, and, eventually, it is held, upon the hearing of the Originating Summons, that the plaintiffs are contractually bound to extend the guarantee until the expiry of the defects liability period or the date on which any defects, which may appear, have been rectified by the plaintiffs, then the defendants would be deprived of the bond which the plaintiffs are obliged to give under the contract. If the injunction is discontinued, the plaintiffs would only have to cause the bond or guarantee to be extended for a short period pending the hearing of the Originating Summons for which I have directed an early date.

Order accordingly.

Solicitors: *Chung & Co. ; Arthur Loke & Partners.*